



Comptroller General
of the United States
Washington, D.C. 20546

Decision

Matter of: Abre Enterprises, Inc.

File: B-251569.2

Date: March 16, 1993

Robert L. Kenny, Esq., Duckor & Spradling, for the protester.
Joan M. Gibson, Esq., Department of Justice, for the agency.
Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester does not have the direct economic interest to be considered an interested party to protest that the awardee's offer is materially unbalanced or to challenge the agency's affirmative determination of the awardee's responsibility where the record shows that even if the protest were sustained, the protester would not be next in line for award.

DECISION

Abre Enterprises, Inc. protests the award of a contract to Robertson Leasing Corporation (RLC) under request for proposals (RFP) No. MS-92-R-0041, issued by the United States Marshals Service, Department of Justice for the towing, storage, maintenance, and disposal of seized and forfeited vehicles in the San Diego, California area. The protester argues that the agency should have rejected RLC's offer as materially unbalanced and the protester challenges the agency's affirmative determination of RLC's responsibility.

We dismiss the protest.

The RFP, issued on July 22, 1992, contemplated the award of a fixed-price, indefinite quantity/indefinite delivery contract for the base year and 4 option years. The RFP required that a contractor furnish a vehicle storage facility. Offerors were advised that if the storage facility was changed after award, the awardee would be responsible for all costs.

The RFP contained separate pricing schedules for each period of contract performance. Each schedule contained three line items corresponding to the following services--towing, storage, and sale of vehicles. On each pricing schedule, line item No. 0002 for vehicle storage contained three subline items which required offerors to insert a price per day for outdoor storage of 1,500 vehicles, a price per day for outdoor storage of 1,501 to 8,000 vehicles, and a price per day for indoor storage of 200 vehicles. For each of these subline items, offerors were required to multiply the number of vehicles by the price per day to arrive at a total price per day and then to multiply this figure by 365 days to arrive at a total price per year. For each period of contract performance, the agency guaranteed a minimum of an average of 1,500 vehicles per month based on annual outdoor storage.

The RFP required offerors to submit separate technical and price proposals. The RFP listed four equally weighted technical evaluation factors worth a total of 60 points. Total evaluated price was weighted at 40 points. In scoring price proposals, the low priced offeror would receive the maximum number of points for price, with the other offerors receiving a percentage of these points based on a ratio of the low priced offeror's price to the other offerors' prices. The RFP provided that the award would be made to the offeror whose proposal, conforming to the RFP, was determined to be in the best interests of the government, price and technical factors considered.

Eight firms submitted initial proposals by the amended closing date of August 28. After an initial technical evaluation by the agency's technical evaluation board, discussions were conducted. Each competitive range offeror submitted its best and final offer (BAFO) by the October 13 closing date. The technical evaluation board found each offeror technically acceptable. Each offeror's BAFO received a score for technical merit and a score for price. In the contracting officer's price analysis/source selection document, the contracting officer, who was also the agency's source selection authority, added these scores together and ranked each offeror based on its total combined score. The final individual technical merit and price scores and the final combined total score and final ranking for the relevant offerors in the competitive range were as follows:

	<u>Technical</u>	<u>Price</u>	<u>Total</u>	<u>Rank</u>
RLC	50.48	40.00	90.48	1
Firm A	48.60	20.80	69.40	2
Protester	35.09	34.13	69.22	3

On November 30, the contracting officer awarded a contract to RLC, the highest technically rated, low priced responsible offeror which received the highest combined total score for technical merit and price. Following contract award, RLC notified the agency that it was substituting an alternate storage facility. This alternate facility initially had been evaluated by the technical evaluation board in connection with proposals submitted by three other firms, including Firm A. The agency approved this alternate facility as having the capacity to store the maximum number of vehicles contemplated by the RFP.

The protester argues that RLC's pricing scheme (in which for each period of contract performance RLC inserted a price per vehicle per day for outdoor storage of 1,500 vehicles and inserted a price of \$0 for both outdoor storage of 1,501 to 6,000 vehicles and indoor storage of 200 vehicles) is materially unbalanced and will only result in the lowest overall cost to the government if RLC stores the maximum number of vehicles as reflected in the RFP.¹ The protester also challenges the contracting officer's affirmative determination of RLC's responsibility in light of the fact that RLC substituted an alternate storage facility after contract award.

Under our Bid Protest Regulations, 4 C.F.R. § 21.0(a), a protester must be an "interested party" before we will consider its protest. An interested party for purposes of eligibility to protest must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to

¹In its comments to the agency report, the protester, the incumbent contractor for the past 5 years, also protests that RLC's offer was materially unbalanced based on defective vehicle storage estimates in the RFP. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992), require that protests based upon alleged improprieties apparent on the face of a solicitation be filed prior to the time set for receipt of initial proposals. Since the protester, based on its experience as the incumbent contractor, knew or should have known of the alleged defects in the government's vehicle storage estimates as specified in the RFP, the protester's argument that RLC's offer is materially unbalanced due to defective government estimates, made after award in its comments to the agency report, is untimely. Allstate Van & Storage, Inc., B-247463, May 22, 1992, 92-1 CPD ¶ 465; District Moving & Storage, Inc., et al., B-240321, et al., Nov. 7, 1990, 90-2 CPD ¶ 373.

award the contract. A protester is not an interested party if it would not be in line for award if its protest were sustained. See Hydrosience, Inc., B-227989; B-227989.2, Nov. 23, 1987, 87-2 CPD ¶ 501.

Here, the protester is not an interested party to protest that RLC's offer is materially unbalanced or to challenge the agency's affirmative determination of RLC's responsibility. (The protester claims that the agency allegedly failed to properly apply definitive responsibility criteria to the awardee's offer.) The contracting officer's price analysis/source selection document shows that the contracting officer determined that RLC, the highest technically rated, low priced responsible offeror, should be awarded the contract on the basis of its highest combined total score for technical merit and price. The contracting officer's price analysis/source selection document also shows that Firm A, the second highest technically rated, third lowest price offeror, had the second highest combined total score for technical merit and price. The contracting officer's price analysis/source selection document further shows that the protester, the lowest technically rated, second lowest priced offeror, which did not challenge the evaluation of its own proposal nor the evaluation of Firm A's proposal, had the third highest combined total score for technical merit and price. Thus, even if the protester's allegations concerning RLC were sustained, the protester is not next in line for award based on the evaluation results.² Therefore, the protester is not an interested party. Systems Dynamics, Inc., B-245666.2, Mar. 11, 1992, 92-1 CPD ¶ 276.


In its comments to the agency report, the protester stated that since RLC's proposal should have been rejected and since its combined technical merit and price score was only .18 points lower than Firm A's and its proposal was \$7 million less than Firm A's, it was the lowest responsible offeror eligible for award. In its supplemental comments to a supplemental report filed by the agency, the protester contends that this statement constituted a challenge of the agency's evaluation of Firm A's proposal and thus makes the protester an interested party.

²While the protester argues that it may be next in line for award if its protest were sustained because the contracting officer has made no specific finding that it would pay a price premium to Firm A, a higher technically rated, higher priced offeror, we find that the contracting officer's final ranking of offerors in the price analysis/source selection document clearly shows that Firm A, not the protester, is next in line for award after RLC.

Concerning the above-referenced statement in the protester's comments, in our view, this statement is nothing more than a recitation of facts apparent from a review of the contracting officer's price analysis/source selection document which was included with the agency report. Even if the protester's statement in its comments to the agency report could be construed as a basis of protest, it was not timely filed within 10 working days after the basis of protest was known, or should have been known. 4 C.F.R. § 21.2(a)(2). The record shows that since the protester received the agency report on January 29, 1993, its comments were due on February 12, 10 working days after receiving the agency report. Pursuant to the protester's request, our Office granted the protester a 1-working day extension, until February 16, to file its comments. The protester made the statement in its comments filed on February 16, 11 working days after receiving the agency report. Since a time extension for purposes of filing comments to an agency report does not waive the timeliness rules with regard to new grounds of protest, Telephonics Corp., B-246016, Jan. 30, 1992, 92-1 CPD ¶ 130, we find that this alleged basis of protest is untimely.

Therefore, because neither in its initial protest nor in its comments to the agency report did the protester challenge the evaluation of Firm A's proposal, and, as previously discussed, Firm A is the offeror next in line for award if we sustained the protester's allegations concerning RLC because Firm A had the second highest combined total score for technical merit and price, we find that the protester is not an interested party.

Accordingly, the protest is dismissed.



Michael R. Golden
Assistant General Counsel